Cognizant from the record before it of the many ways that the cable industry has sought to use its monopoly power to deprive competitors of programming on fair terms and conditions, Congress adopted the sweeping restriction set forth in Section 628(b). Under that provision, it is now unlawful for a cable operator or a vertically integrated programming vendor "to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[47] Thus, regardless of whether a given anticompetitive practice is specifically proscribed under subsection (c), a right exists under subsection (b), and the Commission must afford a remedy to an aggrieved multichannel video programming distributor.

Just because misconduct may be actionable under antitrust laws of general applicability does not deprive the Commission of jurisdiction under Section 628, as the *NPRM* implies it might.[48] Rather clearly, Congress recognized that the antitrust laws were not an effective means of preventing cable misconduct -- as WCA testified on more than one occasion, the cost in money and time of antitrust litigation makes it unworkable as

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[47]Given the breadth of the language of Section 628(b), WCA must disagree with the suggestion advanced in Paragraph 8 of the *NPRM* that Section 628(b) is merely targeted at behavior associated with vertical integration. The Commission must implement Section 628(b) in accordance with its express language, and afford a remedy for any conduct by a covered entity that constitutes "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent" any multichannel video programming distributor from competing.

[48]*See NPRM, supra* note 2, at ¶ 13 n. 32.

a mechanism for promoting competition in the video marketplace. Although Congress made certain not to eliminate antitrust remedies,[49] there is no indication whatsoever that the substantial benefit of expedited review afforded under Section 628(f)(1) is to be denied an aggrieved multichannel video programming distributor merely because the conduct complained of might be actionable under other laws.

In fact, the legislative history is rather clear that the Commission is to consider complaints alleging violations of Section 628(b), even if the conduct complained of also is actionable under the antitrust laws. In its Report on S.12, the Senate Committee on Commerce, Science and Transportation provided that:

> The bill provides for an expedited administrative remedy for complaints brought under [Section 628]. The goals of this provision is to have programming disputes resolved quickly and without imposing undue costs on the involved parties. Without such a remedy, start-up companies, in effect, might be denied relief in light of the prohibitive cost of pursuing an antitrust suit.[50]

B. The Commission Must Adopt Broadly Defined Attribution Policies That Are Consistent With Congress' Intent; The Broadcast Attribution Polices Are Not

As the Commission recognizes in the *NPRM*, one of the most critical issues before it in this proceeding is the establishment of the threshold at which a cable operator's ownership interest in a programmer will be considered attributable for purposes of Section

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[49]*See* 1992 Cable Act, §27 ("Nothing in this Act or the amendments made by this Act shall be construed to alter or restrict in any manner the applicability of any Federal or State antitrust law.").

[50]Senate Report, *supra* note 13, at 28-29.

628.[51] Indeed, WCA submits that unless a carefully crafted attribution standard is adopted, the Commission will substantially undercut Congress' desire to assure emerging competitors to cable fair access to the programming consumers demand and, if that happens, consumers will be deprived of the improved service, increased program diversity and lower costs that competition is sure to offer.

While not specifically proposing any given standard, the *NPRM* solicits comment on whether the provisions of Section 73.3555 of the Commission's rules for defining attributable interests in broadcasting serve as an appropriate model in developing rules to implement Section 628. Although some elements of the Commission's current broadcast attribution rules should be incorporated into the Section 628 attribution rules, as a whole the broadcast attribution rules do not serve as an appropriate starting point when developing rules implementing Section 628. There are unique policy considerations that must be addressed in crafting attribution rules for the cable industry that simply do not

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[51] *See NPRM, supra* note 2, at ¶ 9. As noted in footnote 18 to the *NPRM*, the express language of Section 628(b) provides that a "cable operator" is barred from "engag[ing] in unfair methods of competition or unfair or deceptive acts or practices" <u>even if it does not have an attributable interest in the programmer.</u> *See id.* at ¶ 18 n.18. Certainly, Congress could have limited Section 628(b) to vertically-integrated cable operators; that Congress knew how to do so is evidenced by the specific provisions of Section 628(c)(2)(A), which is limited by its terms to "a cable operator which has an attributable interest in a satellite cable programming vendor." Particularly given Congress' findings that cable operators exercise market power by virtue of their local monopoly (regardless of whether they are vertically integrated), there is no basis whatsoever for the Commission to limit Section 628(b) to cable operators that have attributable interests in programmers. *See, e.g.* Senate Report, *supra* note 13, at 24.

arise in the context of the broadcast field.[52] Section 628 differs in significant respects from the broadcast cross-ownership restrictions in purpose and policy, and attribution rules for Section 628 must be tailored to advance the particular goals Congress sought to achieve when enacting Section 628.

As a general proposition, the broadcast attribution rules have been applied in order to prevent undue horizontal concentration of control of the media -- the goal has been to assure that no one person exercises undue control over competing media.[53] By way of contrast, there is no indication that Congress intended that only a controlling interest be deemed an "attributable interest" for purposes of Section 628. Rather, Congress was concerned about the incentives and opportunities that a cable operator has to exercise undue influence over the suppliers of video programming -- incentives and opportunities that exist even when the cable operator does not exercise actual control.

Certainly, the Section 628 attributable interest rules must be broad enough to encompass an interest that could afford the holder an opportunity to directly influence the programmer's conduct. In crafting attribution rules to implement Section 628, the Commission must find a person to have an attributable interest in any cable system or

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[52]That attribution rules appropriate in one context may not be appropriate in another , and that the Commission is required to tailor attribution rules to the particular circumstances before it, is well-established. *See, e.g. Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, Notice of Proposed Rulemaking, Docket No. 20521, FCC 83-46, at ¶ 14 (rel. Feb. 15, 1983).

[53]*See Attribution of Ownership Interests in Broadcasting, Cable Television and Newspaper Entities*, 97 F.C.C.2d 997, 1004 (1984), *on further reconsideration*, 1 FCC Rcd 802 (1986).

programmer that it "controls." In this case, the definition of "control" contained in the broadcast attribution rule is appropriate -- "[t]he word 'control' . . . is not limited to majority stock ownership, but includes actual working control in whatever manner exercised."[54]

Even today, when the Commission is considering increasing the stock ownership benchmarks of the broadcast attribution rules to promote passive investments in the broadcast industry, it has recognized that the holding of a management position must still constitute an attributable interest because it provides significant opportunities to influence a broadcaster's conduct.[55] Similarly, in crafting Section 628 attribution rules, the Commission should find an attributable interest in a programmer or cable operator present when a person is an officer or director or has the ability to designate an officer or director.[56]

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[54]47 C.F.R. § 73.3555 note 1.

[55]*See Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, 7 FCC Rcd 2654, 2655 n. 11 (1992).

[56]More specifically, the Commission should deem a person to have a Section 628 attributable interest in a corporation when that person is an officer or director, holds a debt or equity interest that specifically affords that person the right to designate an officer or director, holds sufficient stock that the person can elect a director, or holds options, warrants or other security interests convertible into sufficient stock that the person can elect a director. Of course, if one of these interests is held indirectly, through an intervening legal entity, that interest should continue to be attributable so long as the person's interest in the intervening legal entity is also attributable under the Section 628 standards.

Finally, the Section 628 attribution rules must deem attributable all ownership and financial interests that afford the holder an opportunity to unduly influence a programmers' conduct. Under the circumstances, WCA believes that the most appropriate model for an ownership attribution standard can be found in former Notes 1 and 2 to Section 63.54 of the Commission's Rules; the attribution rules that applied to telephone company participation in programming prior to the advent of video dialtone. Under those rules an attributable interest was found present where there was an "element of ownership or other financial interest" in common, or "where any party has a financial interest in both" entities in issue. The only exceptions were for corporations with more than 50 shareholders. For such corporations, only direct or indirect holdings of 1% or more were attributable (except that all holdings by officers and directors were attributable), and certain investment company holdings were excluded.

While the Commission recently modified Section 63.54 to permit telephone companies to acquire interests of up to 5% in video programmers, it relied on the facts that:

> telephone companies offering video dialtone must offer all video programmers nondiscriminatory access to the basic platform. Further, although the local telephone company is permitted to create its own video gateway with both ownership affiliated and non-ownership affiliated video programmer, any video programmer is also free to create a video gateway. We also have in place a comprehensive scheme of discrimination and cost accounting safeguards that should effectively protect against anticompetitive conduct.[57]

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[57]*Telephone Company-Cable Television Cross- Ownership Rules, Sections 63.54 - 63.58*, CC Docket No. 87-266, FCC 92-327, at ¶ 36 (rel. Aug. 14, 1992).

Of course, none of these prophylactic measures exist with respect to the cable operator/video programmer relationship, making it appropriate for the Commission to adopt a lesser threshold in crafting Section 628 attributable interest standards.

Adoption of a Section 628 attribution standard modeled along the former provisions of Section 63.54 should not meet with objection from the cable industry. Historically, the cable industry has argued that if a gateway provider has more than a 1% attributable interest in a video program supplier, there will be an incentive to engage in anticompetitive conduct.[58] Indeed, the National Cable Television Association presently has pending before the Commission a petition urging the Commission to reinstate the former rules governing telephone company interests in video programmers, arguing that "Allowing telcos to own any additional interest [beyond that permitted under former Notes 1 and 2] would clearly give them incentives to favor those providers over other programmers".[59] Certainly, if the cable industry believes the position it is espousing in CC Docket No. 87-266, it cannot disagree with WCA's view that allowing a cable operator to have an interest in excess of that permissible under Notes 1 and 2 constitutes an attributable interest that triggers Section 628.

In selecting a Section 628 attribution standard, the Commission must remain cognizant of the minimal impact on the programmer of finding a cable operator to have

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[58]*See id.* at ¶ 33.

[59] Petition for Reconsideration of Nat'l Cable Television Ass'n, CC Docket No. 87-266, at 13 n. 22 (filed Oct. 9, 1992).

an attributable interest in the programmer for purposes of Section 628. While the attribution rules incorporated in Sections 63.54 and 73.3555 of the Commission's Rules are employed to determine whether cross-ownerships are banned, the impact of finding an interest to be attributable for purposes of Section 628 is much less harsh. Section 628 generally does not impose a *per se* ban on any activity; rather, it merely launches an inquiry into the appropriateness of the programmer's treatment of an aggrieved multichannel video programming distributor. Thus, a more inclusive attribution standard will not prevent relationships that might otherwise serve the public interest, for the programmer can always justify such behavior. However, a broad standard such as WCA proposes will assure a remedy where abuse occurs, and prevent the cable industry from artificially structuring relationships that comply with the letter, but not the spirit, of the Section 628 attribution standards.

C. The Commission Must Apply Section 628 To Existing Contracts Except For The Narrow Grandfathering Of Exclusive Contracts Covering Areas Actually Served By Cable.

Quite frankly, WCA is flabbergasted by the proposal advanced in the *NPRM* to exclude from the reach of the non-discrimination provisions of Section 628 any existing agreements.[60] The adoption of such a policy would not only substantially undercut Congress' intent, but also unnecessarily delay the consumer benefits that Section 628 is expected to produce.

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[60] *See, NPRM, supra* note 2, at ¶ 27.

Not surprisingly, the Commission has failed to cite to a single reference in the 1992 Cable Act or its legislative history to support its proposal to exclude existing contracts from the reach of Section 628 -- no such references exist. There is absolutely nothing in the 1992 Cable Act or its legislative history to suggest that Congress intended to generally grandfather existing contracts from the reach of Section 628 and delay the consumer benefits Congress expects to flow from providing consumers a choice in multichannel video programming distributors. Indeed, just the opposite its true. With Section 628(h), Congress specifically exempted a narrow class of prior contracts from the reach of Section 628 -- those contracts granting exclusivity that were entered into prior to June 1, 1990 and apply to areas actually served by a cable operator. In light of that provision, it defies logic for the Commission to imply that Congress actually attempted to grandfather all existing contracts.

Certainly, WCA does not oppose affording programmers a reasonable opportunity to bring their existing agreements with multichannel video programming distributors into compliance with whatever new rules are promulgated by the Commission in this proceeding.[61] WCA suggests that a ninety day period after those new rules are published

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[61]Regardless of whether existing agreements requiring multichannel video programming distributors to pay discriminatory rates are grandfathered, the Commission must assure that if a cable operator is licensed to distribute programming under a pre-existing agreement with a programmer that is affiliated with a cable operator at a price lower than that charged a wireless cable operator in the future, the wireless cable operator must be able to cite the pre-existing agreement with the cable operator as evidence of price discrimination and the programmer must be required to justify the differential under the criteria set forth in Section 628(b)(2)(B), even if the programmer is not required to modify its agreement with the cable operator.

in the *Federal Register* should be sufficient, and that no complaints alleging violations of the non-discrimination rules be accepted during that time. However, so that programmers have an incentive to bring themselves into compliance with the new rules, without the need for enforcement proceedings, the Commission should make clear that if an agreement in existence on the date of *Federal Register* publication is subsequently found to be violative of Section 628, damages will relate back to the December 3, 1992 effective date of Section 628.[62]

D. Any Multichannel Video Programming Distributor Aggrieved By Programmer Violations Of Section 628 Has A Cause of Action, Even If It Does Not Directly Compete Against A Cable Operators With An Attributable Interest In The Programmer.

In the *NPRM*, the Commission questions whether "our prohibitions generally [should only] apply in these local markets where an entity is in fact vertically integrated, i.e., where it holds an attributable interest in the local cable system" and implies that it is prepared to deny a multichannel video programming distributor that is aggrieved by a programmer violation of Section 628 a remedy unless that distributor directly competes against a cable operator with an attributable interest in the programmer.[63] WCA respectfully submits that it would be an unabashed abuse of discretion if the Commission adopts such a policy.

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[62]The authority vested by Section 628(e)(1) of the 1992 Cable Act in the Commission "to order appropriate remedies, including, if necessary, the power to establish price, terms and conditions of sale of programming to the aggrieved multichannel video programming distributor" is sufficiently broad to permit the relation back of any Commission-mandated price, terms and conditions to the effective date of Section 628.

[63]*NPRM, supra* note 2, at ¶11.

It is certainly no accident that the Commission has failed to cite to a single reference in either Section 628 or its legislative history to support its proposal, for none exists. The plain language of Section 628 speaks with crystalline clarity -- so long as a cable operator has an attributable interest in a programming vendor, that programmer is subject to Section 628 wherever it does business. For example, the broad prohibition of Section 628(b) applies, by its very terms, to "a satellite cable programming vendor in which a cable operator has an attributable interest". (emphasis added). So long as such a programmer engages in any "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor" from serving subscribers, a cause of action exists, regardless of where the cable operator with the attributable interest conducts business. Similarly, Section 628(c)(2)(B) prohibits discrimination by "a satellite cable programming vendor in which a cable operator has an attributable interest . . . among or between cable systems, cable operators, or other multichannel video programming distributors or their agents or buying groups" without any requirement that the discrimination involve the particular cable operator that holds the attributable interest in the programmer.

Congress' failure to specifically limit Section 628 is particularly telling given the Commission's 1990 *Report* to Congress on the status of competition in the video marketplace. In that *Report*, the Commission specifically proposed that program access rights be limited to those markets where the local cable operator has a cognizable interest in the programmer refusing to deal with alternative technologies. Given the numerous reference to the *Report* in the legislative history of the 1992 Cable Act, Congress must be presumed to have been aware of the Commission's proposal, and to have rejected it.

Congress' rejection of the Commission's proposal was understandable, for the Commission's approach would not accomplish Congress' intended purpose -- assuring alternative multichannel service providers of access to the programming services necessary to compete. It was simply impossible to square the remedy advanced by the Commission with the specific findings of fact announced in the *Report*, much less the record developed during Congress' five years of proceedings on the issue. On the basis of the voluminous evidence in the record concerning the harms befalling consumers as a result of the local cable monopoly, Congress has expressly determined that emerging technologies require fair access to a critical mass of essential programming services in order to compete. Logic then dictates that any legislation adopted by Congress to promote competitive alternatives to cable assure emerging technologies fair access to the *full* complement of programming services necessary to compete. However, adoption of the proposal advanced in the *NPRM* at best would provide any given new entrant into the marketplace with assured access to perhaps a few programming services (the number and identity of which would depend upon the cognizable interests of the entrenched cable operator in the local market), but would *never* assure fair access to *all* the services needed to compete. The legislation proposed by the Commission would have failed to assure potential new entrants into the marketplace of fair access to all the programming consumers demand. And, the programming that would be available under the Commission's approach, even under the most favorable scenarios, would fall far short of that required to effectively compete.

Were there evidence in the record that vertically integrated programmers only discriminate against emerging technologies in those markets where affiliated coaxial cable operators hold franchises, the approach advocated by the Commission might have accomplished Congress' goal of assuring the competitive viability of alternative service providers. But, the requisite evidence to support such a regulatory scheme simply did not exist; indeed, the evidence in the record before Congress was to the contrary.

The record before Congress was replete with uncontroverted evidence that vertically integrated programmers discriminate regardless of whether or not the potential competitor will directly compete against an affiliated entity. The record contains numerous examples where a vertically integrated programmer has discriminated against a wireless cable operator, even when that wireless operator will not be competing against cable operators owning the programmer. For example, WCA detailed in filings with Congress the experience of Wireless of Los Angeles, which was denied the right to distribute TNT even in those areas that are not served by any cable company, an experience that was hardly unique. Similarly, an independent study submitted by WCA recounted the refusal of HBO to permit one wireless cable operator to offer HBO via its wireless system (which does not compete against any cable system vertically integrated with HBO), even though the operator does offer HBO over its franchised cable system.[64] Indeed, even the Commission's own *Report* cites an instance in which Cablevision has imposed discriminatory terms upon wireless carriage of a Cablevision-owned programming service in areas not served by a Cablevision cable system.[65]

These anecdotes are merely illustrative of the realities of today's marketplace; the problem is not limited to just those geographic areas where a vertically-integrated programmer's affiliated cable systems operate. The Commission cannot as a matter of law, and should not as a matter of policy, attempt to limit Section 628 to those areas, since such a limitation obviously was not intended by Congress.

E. Congress Has Determined That Discriminatory Conduct Violative Of Section 628(c)(2)(B) Is Actionable, And The Commission Cannot Impose Upon Complainants The Burden Of Demonstrating Harm.

In the *NPRM*, the Commission proposes to impose on a multichannel video programming distributor aggrieved by discriminatory conduct violative of Section 628(c)(2)(B) the burden of not only demonstrating that it has been the victim of discriminatory treatment, but also that it has been prevented or significantly hindered in providing programming to consumers as a result.[66] Indeed, the Commission goes so far as to imply that a multichannel video programming distributor cannot seek redress for

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[64] *See* Pearce and Whitaker, *Video Programming Availability and Consumer Choice*, at 12 (Information Age Economics 1990).

[65] *See FCC Report*, *supra* note 5, 5 FCC Rcd at 5023-24

[66] *See, e.g. NPRM*, *supra* note 2, at ¶ 10.

price discrimination if the distributor carries the programming despite the higher price, and suggests that a complainant may have to go so far as to demonstrate that the discrimination threatens the viability of its service offering.[67] Simply put, there is absolutely nothing in Section 628 or its legislative history to suggest that Congress intended to limit the reach of its non-discrimination provisions in this manner.[68]

The Commission attempts to justify its proposal to require a specific showing of harm by complainants under subsection (c) of Section 628 by citation to the requirement under subsection (b) that "the purpose or effect" of the conduct complained of must be "to hinder significantly or prevent" a multichannel video programming distributor from providing satellite cable programming to consumers.[69] Note, at the outset, that Section 628(b) itself does not even require a demonstration of actual harm -- a cause of action exists where a cable operator or programmer has taken action with the "purpose" of hindering an alternative service provider, even if the "effect" of such action fails to achieve its purpose. Thus, the logical predicate for the Commission's proposal to require victims of discriminatory conduct to demonstrate significant actual harm is flawed; no

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[67]*See id.*

[68]In fact, it is rare that discriminatory rates by any one programmer will alone jeopardize the prospects for competition; generally, it is the cumulative effects of discrimination by several programmers. But, in any event, every penny that must be paid to a programmer due to discrimination is a penny less in savings that an alternative service provider can pass along to subscribers in reduced rates.

[69]*See, e.g. NPRM, supra* note 2, at ¶ 10.

complainant under Section 628(b) must demonstrate harm if the conduct complained of was undertaken with the intention of hindering its offering of programming to subscribers.

The Commission's proposal to require victims of discrimination to demonstrate significant harm, perhaps even to demonstrate that their viability is threatened, is doubly flawed. Congress has already found that, unless justified under the factors enumerated in Sections 628(c)(2)(B)(i)-(iv), the imposition of discriminatory price, terms or conditions by a programmer in which a cable operator has an attributable interest is a *per se* violation of Section 628. In effect, Congress has found that unless justified by the specific considerations it found relevant, discrimination has either the purpose or the effect of significantly hindering the emergence of competition. It is not for the Commission to revisit that determination.

In short, it would be contrary to the express language of Section 628 for the Commission to require a multichannel video programming distributor aggrieved by conduct violative of Section 628(c)(2)(B) to demonstrate that it has suffered significant actual harm as a result.

F. The Common Carrier Model For Evaluating Claims of Discrimination, Modified As Necessary Under The Circumstances, Will Best Accomplish The Goals Of Section 628(c)(2)(B).

The *NPRM* solicits public comment on several alternatives advanced by the Commission for developing standards to distinguish between price differentials that are justifiable under Sections 628(c)(2)(B)(i)-(iv) and those that constitute unlawful discrimination. Although WCA believes that none of the available models perfectly applies to Section 628(c)(2)(B), it submits that the Commission's approach to complaints under Section 202 of the Communications Act of 1934 is the most applicable starting point for developing standards that will evolve over time.

For the Commission to adopt its first option, under which price differentials would be rebuttably presumed valid if within a given "reasonable region," would be contrary to Congressional intent, and unworkable for both the Commission and aggrieved multichannel video programming distributors. The Commission's purpose in establishing a "reasonable region" appears to be to create rebuttable presumptions regarding the propriety of any given discrimination.[70] However, Congress has already undertaken that task; Section 628(c)(2)(B) prohibits any discrimination unless the programmer can demonstrate that it is justified under Sections 628(c)(2)(B)(i)-(iv). The rebuttal presumption established by Congress is that any discrimination is unlawful.

Moreover, the Commission's approach is unworkable. Given the wide range of factors that the Commission is required to consider under Sections 628(c)(2)(B)(i)-(iv), and the fact that many of those are subjective to the particulars of a given situation, WCA does not believe it possible for the Commission to develop a "reasonable region" that would bear any rational relationship to the facts of any given case. Thus, it is unlikely to result in any significant reduction in the Commission's workload, for the specific facts of each case will have to be considered in any Section 628 proceeding. It will, however, have a chilling effect on aggrieved multichannel video programming distributors. While

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[70]*See NPRM, supra* note 2, at ¶ 20.

Congress presumably expected that programmers would have to demonstrate that any different treatment is justifiable, the Commission's approach will shift to the aggrieved party the burden of rebutting a presumption that a discrimination within the "reasonable region" is unlawful. That will be a heavy burden indeed, particularly since the programmer will be in possession of most of the facts relevant to a determination of whether the differential is justified under Sections 628(c)(2)(B)(i)-(iv).[71] One need not have a crystal ball to know that as soon as the Commission adopts a "reasonable region", cable operators will pressure programmers to discriminate to that level, and programmers will do so to satisfy their largest customers.

The Commission's proposal to employ antitrust standards is inconsistent with Congressional intent. By adopting Section 628(c)(2)(B), Congress clearly sought to afford multichannel video programming distributors aggrieved by discriminatory conduct a remedy broader than that afforded under the antitrust laws. For example, as the *NPRM* acknowledges, the Robinson-Patman Act only affords the victims of price discrimination a remedy where the effect of the discrimination is to substantially lessen competition. Yet, as demonstrated above, Congress intended to ban discriminatory conduct by programmers subject to Section 628(c), regardless of whether there has been significant

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[71]While WCA presumes that the Commission would afford aggrieved multichannel video programming distributors full discovery rights to rebut any presumption, the cost of discovery alone may have prevented operators from protecting their rights under Section 628(c)(2)(B). If that occurs, the public will be the ultimate loser, for wireless cable rates will necessarily be somewhat higher than they would be if Section 628(c) were less costly to enforce.

harm to the victim.[72] While certain antitrust principles may prove to be relevant as the Commission evaluates specific complaints on a case-by-case basis, the rights afforded by Section 628(c)(2)(B) are clearly broader.

The Commission's fourth option -- based on the principles employed by the International Trade Administration ("ITA") in anti-dumping cases -- is equally flawed. While certain elements of the ITA's approach may prove helpful in analyzing specific cases, the fundamental differences between Section 628(c) and the anti-dumping laws forthrightly noted by the Commission in the *NPRM* render it a poor model.[73]

WCA agrees with the Commission that the approach employed under Section 202 of the Communications Act can serve as an appropriate model. While the language of Section 202 differs somewhat from that of Section 628(c)(2)(B), it should not prove difficult for the Commission to modify its standards to accommodate those differences. Particularly since the Commission has experience in applying Section 202 principles to discrimination by programming vendors, the Commission should be able to quickly implement Section 628(c)(2)(B) standards based on Section 202.

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[72]*See supra* at page 34.

[73]For example, the Commission has recognized that the ITA's approach is tailored for situations where prices are artificially lowered to gain a competitive advantage, while Section 628(c)(2)(B) is intended to address situations in which prices are artificially raised by programmers to disadvantage non-affiliated multichannel video programming distributors. *See NPRM, supra* note 2, at ¶ 24.

G. The Procedures For Implementing Section 628 Proposed In The *NPRM* Must Be Revised To Comport With Congressional Intent.

In the NPRM, the Commission has proposed to utilize formal complaint procedures to implement Section 628. While WCA has no quarrel with that proposal as a general proposition, it is troubled by several of the more specific proposals advanced in the *NPRM.*

1. Congress Intended For All Exclusive Contracts To Be Subject To Public Interest Review.

Under Section 628(c)(2)(D), the Commission is required in this proceeding to develop regulations that will "prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines . . . that such contract is in the public interest." While it seems rather evident that Congress intended for the Commission to make such a determination with respect to each and every exclusive contract, the *NPRM* proposes "for administrative reasons" to only consider those exclusive contracts that are the subject of formal complaints. That is totally unacceptable.

The flaw in the Commission's proposal is, ironically, evident from the *NPRM* itself. The Commission asks:

> how will a multichannel competitor establish the existence of an 'exclusive' contract if it does not have access to the contract? What if the contract is not written?[74]

How indeed? Since the Commission itself recognizes that aggrieved multichannel video programming distributors cannot be counted upon to know of every exclusive contract, much less to file a formal complaint, the complaint procedure obviously provides no assurance that every exclusive contract will necessarily meet the public interest requirement of Section 628(c)(2)(D).

The Commission's proposal to grant all new programming services blanket consent to enter into exclusive contracts without any prior review is particularly absurd.[75] At the outset, the factual predicate for the Commission's proposal -- that "exclusive rights may well be essential to the introduction of new services"[76] -- has never been substantiated. The Commission cannot merely accept self-serving statements to that effect from the cable interests and the programmers beholden to those interests. Rather, a far more searching inquiry, addressing all of the factors set forth by Congress in Section 628(c)(4), is required. While certainly the need to grant exclusivity in exchange for carriage is one element for consideration, Congress has also mandated that the Commission explore the duration of the contract and evaluate its impact on the development of competition and the diversity of programming available in the marketplace. Indeed, the *NPRM*'s embrace

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[74] *NPRM, supra* note 2, at ¶ 33.

[75] See id., at ¶ 36.

[76] *Id.*

of exclusive contracts by new services simply cannot be squared with the Commission's acknowledgement in its 1990 *Report* to Congress that exclusive agreements entered into by new programming services can impede competition in the local distribution marketplace.[77]

The fact is that exclusive contracts in the cable area cannot be justified by the same sorts of efficiency considerations that have generally been cited in support of exclusivity. It is axiomatic that exclusivity is contrary to the public interest when it is intended to cartelize distribution -- precisely what has happened in the cable industry -- rather than increase output.[78] The cable industry has conceded that exclusivity is offered to preserve the incumbent cable operator's monopoly -- ESPN once offered monopoly cable systems exclusivity as "overbuild insurance" in company promotional materials.[79] There is no evidence that any exclusivity given to date by cable programmers has increased revenues to the programmer. The burden must be on any proponent of an exclusive contract to

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[77] *See FCC Report, supra* note 5, 5 FCC Rcd at 5032 n. 192 ("an example of an exclusive distribution arrangement that might impede competition in the local distribution market and be disfavored by the Commission would be a situation in which a vertically integrated programmer were to create any new exclusive service(s) that unreasonably siphoned extensive programming from any previously non-exclusive service(s)). Indeed, that is precisely what TBS did when it established TNT -- it moved the highly popular National Basketball Association ("NBA") games from Superstation WTBS to TNT. Given the growing popularity of the NBA and the continued refusal of TNT to deal with wireless (although the initial exclusive agreements have long ago expired), that move continues to have an adverse impact on the ability of wireless cable to compete with cable.

[78] *See* Hazlett, "Telco Entry Into Video", at 34.

[79] *See id.*

demonstrate to the Commission that exclusivity will increase revenues; otherwise, the presumption should be that the exclusivity is being offered as a result of the market power of the cable operator.

While WCA is certainly sympathetic to the Commission's desire to minimize its workload, there are alternative mechanisms available by which the Commission can meet Congress' mandate that every exclusive contract be reviewed without unnecessarily burdening the staff. WCA suggests that any cable operator that enters into an exclusive contract be required to submit a request that the Commission find the agreement to be in the public interest, along with either a copy of the agreement or, if it has not been reduced to writing, a summary of its essential terms. The Commission would then issue a public notice of the acceptance for filing of that request, and make the request and the exclusive contract or summary available for public inspection,[80] and afford a thirty day period for the filing of petitions to deny. Unless such a petition is filed, or the Commission on its own motion decides otherwise, the request should be deemed automatically granted as of the thirty-first day after the release of the public notice. Where a petition is filed, the Commission could then employ an expedited process to render a rapid decision as to whether the exclusive agreement passes muster.

[80]Upon request of the cable operator, the Commission should redact any competitively sensitive data, other than data that would assist the public in commenting as to whether the agreement comports with the public interest standards enumerated in Section 628(c)(4).

Such an approach has the benefit of assuring that all exclusive contracts are brought to light and given the scrutiny Congress desired, without imposing an otherwise avoidable workload on the Commission's staff.

2. The Threshold Standard For Making *Prima Facie* Section 628 Cases Must Not Be So High That It Cannot Practically Be Met.

In establishing the procedures to be followed in considering complaints alleging violations of Sections 628(b) and (c), the Commission must remain cognizant of the environment in which violations occur. As a general proposition, the wireless cable operator or other multichannel video program distributor that is aggrieved will have precious little information available to it prior to the initiation of discovery, for it will not be privy to the negotiations between the programmer in issue and cable operators. Thus, the Commission must establish the threshold for a *prima facie* case at a relatively low level; one that permits the submission of probative, yet admittedly circumstantial evidence in support of a Section 628 complaint.

WCA believes that specific thresholds for complaints alleging different types of misconduct will generally have to be established on a case-by-case basis, for the kinds of mischief that can constitute a violation of Section 628 are legion and cannot all be considered here. However, the Commission can and should in this proceeding establish thresholds for a *prima facie* case alleging violations of the specific provisions of Sections 628(c)(2)(B), (C) and (D).

Specifically, the Commission should establish that a complaint alleging violation of the non-discrimination provisions of Section 628(c)(2)(B) is sufficient if it is accompanied by evidence that reasonably suggests that the terms and conditions proffered by a programmer in which a cable operator has an attributable interest differ from those contained in any agreement that programmer has with any other multichannel video program distributor. Such a showing should be sufficient to shift the burden to the programmer to establish either that no such difference exists or that the difference is permissible under the specific exceptions provided for in Sections 628(c)(2)(B)(i) - (iv).[81] Similarly, the Commission should declare that a complaint alleging a violation of the anti-exclusivity provisions of Section 628(c)(2(C) and (D) sets forth a *prima facie* case if it establishes that the complainant requested a distribution agreement, but the programmer refused. The burden should then shift to the programmer to demonstrate either that no exclusive agreement exists, or that the refusal to deal is based on an agreement that has previously been found by the Commission to be in the public interest.[82]

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[81]As demonstrate *supra* at page 34, the Commission cannot and should not require a multichannel video programming distributor aggrieved by discrimination to specifically demonstrate that a significant injury resulted from that discrimination.

[82]If the Commission ignores WCA's demonstration, *supra* at page 40, that all exclusive agreements must be approved by the Commission as being in the public interest at the time they are entered into, and instead relies on the complaint process, then the burden should shift at this stage to the programmer to demonstrate that its exclusive agreement is in the public interest. Particularly if the complain proceeding is the first opportunity the Commission and competitors will have to consider the arguments advanced that an exclusive agreement serves the public interest, the Commission must afford the complainant an opportunity to reply.